JUN 25 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~969~~ 114.

NATIONWIDE TRAILER RENTAL SYSTEM, INC., GEORGE A. CROFT, SR., and A. E. SIMON, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

On Appeal from the United States District Court for the District of Kansas

MEMORANDUM IN REPLY TO APPELLEE'S MOTION TO AFFIRM

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On page 7 of the Government's Motion to Affirm there appears a distortion of the record which needs correction. The Government states:

> "The NTRS members adopted a uniform lease contract (Fng. 21, J. St. 9a), and the amount to be charged for overtime was a printed part of this contract (Fng. 22, J. St. 9a)."

The actual finding reads as follows:

> "A uniform lease agreement was adopted *for use* by the members". (Emphasis supplied)

By eliminating the words "for use" the Government gives the impression that the court affirmatively found that contracts rather than form leases were adopted by the members and that a uniform rate for overtime was part of the adopted contract.

The record and findings show that there was no contract or agreement between the members to use the form. It was prepared and adopted for their convenience in dealing with customers.

In Finding 22 the court found only that the "lease" was actually *"used"* but it did not find that there was any compulsion on anyone to use it.

The question, therefore, is whether the circulation of a form which lists an overtime rate, in the absence of any evidence of agreement or compulsion to follow the price named in the form, constitutes a conspiracy to fix prices in the face of uncontradicted testimony that suggested rates were not followed and that NTRS urged its members to reduce rates in order to meet competition.

The Government admits (Motion to Affirm, p. 7) that the members of NTRS were circularized and told that "those who rent one-way trailers are always on the lookout for a bargain". They were further told that they could not "hope to beat our competition" if they "hold trailers for high rentals". From this the Government comes to the following remarkable conclusion (Motion to Affirm, p. 8):

> "The fact that NTRS urged its members to depart from the rate schedule when necessary to meet competitive rates shows that NTRS itself believed that the scheduled rates were those which *normally* would be charged." (Emphasis supplied)

In making this statement the Government assumes that the normal situation in the one-way trailer business is lack of competition. The record shows to the contrary. Competition is continuous and cutthroat in this field. Thus the only evidence of a conspiracy to maintain suggested rates relied on by the Government is a circular urging members not to follow the suggested rates but rather to meet competition by lowering them.

The second position of the Government in its Motion to Affirm is that NTRS by refusing to take in all comers as members was engaged in a division of the national market for the transportation of personal effects and household goods. It cites cases involving some of our largest American corporations and the *Associated Press* case (Motion to Affirm, p. 9).[1]

With respect to this argument we would concede that if one one-way trailer organization made a deal with another to divide territory, the Government's cases might be relevant. But there is no such evidence in this record. Therefore, none of the cases cited on page 9 of the Motion to Affirm has any conceivable bearing on this case. The only case cited by the Government requiring a membership corporation to admit new members is the *Associated Press* case. To apply that decision to the case at bar it is first necessary to overrule *Moore* v. *New York Cotton Exchange*, 270 U.S. 593 (1926), and then to hold that the rule of the *Associated Press* case must apply to every membership corporation however small. The record shows that the total gross income of NTRS was $2,800,000. Divided among the 750 stations this

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[1] *Associated Press* v. *United States*, 326 U.S. 1 (1945).

means that the average gross income of each station was only $3,733. What the net income was we have no way of knowing. If the members made as much as 25% yearly on their investments it would only be $700,000 total or an average of $1,000 apiece. There was no possible handicap on the organization of competing one-way services imposed either by the appellants or by the economic situation. To compare a case like this with the *Associated Press* case is absurd.

The Government's arguments and admissions in its Motion to Affirm compel the conclusion that the decision of the court below should be reversed.

Respectfully submitted,

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